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No. 10-1125

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

DANIEL GUGGENHEIM, et al.,
*Petitioners*,

v.

CITY OF GOLETA,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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Finally, the en banc decision comports with "fairness and justice," the animating principles of the Takings Clause. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). Finding a taking on these facts would generate a windfall for Petitioners, who knowingly paid a price befitting a regulated property. That windfall would come at the expense not only of Respondent's taxpaying residents, but also of mobilehome park residents, who invested in their mobilehomes in reliance on rent control.

Mobilehome owners are in a unique position: they make capital investments in their mobilehomes and other improvements but do not own the underlying land. Mobilehomes are, contrary to the name, effectively immobile. Without limits on rent increases, park owners can force mobilehome owners to either accept exorbitant rents or abandon their homes. Writing for the en banc court, Judge Kleinfeld aptly noted that "the owner of the land has the owner of the mobile home over a barrel." Pet. App. at 5a.

If Petitioners' attempt at judicial deregulation were successful, mobilehome owners who purchased their homes at higher prices reflecting the benefit of rent control would bear both a loss in the value of their investment and an increase in rent.

> The people who really do have investment-backed expectations that might be upset by changes in the rent control system are tenants who bought their mobile homes after rent control went into effect. Ending rent control would be a windfall to [Petitioners], and a disaster for tenants who bought their

> mobile homes after rent control was imposed in the 70's and 80's.

*Id.* at 22a.

The court below correctly applied the *Penn Central* test to conclude there was no taking. This Court should decline Petitioners' invitation to reapply that well-established test.

## BACKGROUND

In 1979, Santa Barbara County enacted an ordinance controlling rents charged at mobilehome parks. The ordinance tied annual rent increases to inflation. Pet. App. at 4a-6a. In 1987, the County amended the ordinance to provide that rents charged to a new tenant in a park could not be increased by more than 10 percent of the rent paid by the prior tenant. *Id.* at 5a-6a; *id.* at 27a (Bea, J., dissenting).

The property at issue has been used as a mobilehome park since long before Petitioners acquired it. The prior owners of the property never challenged the 1979 ordinance or the 1987 amendment. *Id.* at 138a (Kleinfeld, J., dissenting from panel op.).

In 1997, Petitioners purchased the property and continued to operate it as a mobilehome park. *Id.* at 6a. They too never challenged the County ordinance. *Id.* at 16a. In 2002, Respondent City of Goleta was incorporated as a new city from unincorporated territory in the County, including Petitioners' property. *Id.* at 6a.

Upon incorporation, the city council of a new city must adopt, as its first official action, an ordin-

ance "providing that all county ordinances previously applicable shall remain in full force and effect as city ordinances for a period of 120 days after incorporation." Cal. Gov't Code § 57376(a); *see also* Pet. App. at 6a-7a.

As that statute dictated, Respondent's city council voted on February 2, 2002 to continue all of the County's ordinances, including the mobilehome rent control ordinance, for 120 days. Pet. App. at 7a. Then, within the 120-day period, on April 22, the city council readopted without change all of the County ordinances, again including the mobilehome rent control ordinance, as ordinances of the new City of Goleta.[1] *Id.*

Petitioners filed suit in district court challenging, on their face, Respondent's actions to continue the County ordinance. *Id.* at 8a. They did not challenge the County's 1979 enactment or 1987 amendment and did not join the County as a party. *Id.* at 16a. Petitioners alleged, among other claims, that the 2002 ordinance caused an uncompensated taking under the "fails to substantially advance legitimate state interests" test set out in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), and under the *Penn Central* test. Resp. App. at 2-3.

The district court granted summary judgment to Petitioners on the *Agins* claim (Pet. App. at 142a-147a), but vacated the judgment after this Court re-

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[1] Respondent's two identical ordinances are hereinafter referred to collectively as the "2002 ordinance."

pudiated that test in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). *See* Resp. App. at 2-3. After further proceedings, the court denied Petitioners' motion for summary judgment on the *Penn Central* claim,[2] and shortly thereafter entered an order to show cause why the court should not grant judgment to Respondent. After briefing and argument, the court entered judgment for Respondent, and Petitioners appealed. Pet. App. at 9a; *id.* at 64a-67a (panel op.).

In a split decision, a three-judge panel of the Ninth Circuit reversed, concluding that Petitioners had shown a taking under *Penn Central*. *Id.* at 56a-132a (panel op.). In dissent, Judge Kleinfeld argued that Petitioners had not been harmed by Respondent's reenactment of the County's longstanding ordinance. *Id.* at 132a-141a (Kleinfeld, J., dissenting from panel op.). Respondent sought rehearing en banc, and an 11-judge en banc panel reconsidered the case. *See* 9th Cir. R. 35-3.

The en banc court affirmed the district court in an 8-3 decision. Pet. App. at 1a-25a. Judge Kleinfeld, now writing for the majority, reprised his earlier dissent. Applying the *Penn Central* factors, the court held that Petitioners had suffered no taking.

This petition followed.

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[2] Petitioners did not include this order in the appendix to the petition. Respondent has accordingly included it in the appendix to this brief. Resp. App. at 1-24.

## REASONS TO DENY THE PETITION

### I. The En Banc Court Faithfully Applied This Court's *Penn Central* Test to Find There Was No Taking on These Unusual Facts.

Petitioners repeatedly characterize the en banc decision as adopting a per se rule that a takings claimant cannot prevail if he or she had notice of the challenged regulation. Pet. at 2, 6, 8, 14-15, 17, 21, 23, 24. On the contrary, the court faithfully performed the analysis required by this Court in *Penn Central* and determined that the challenged 2002 ordinance did not, on its face, take Petitioners' property.

1. In *Penn Central*, this Court instructed that the Takings Clause demands an "ad hoc, factual inquir[y]" to determine whether a challenged regulation "goes too far" and thus effects an uncompensated taking of private property. 438 U.S. at 124; *see also Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The Court identified three factors to guide that inquiry. "Primary among those factors are '[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.'" *Lingle*, 544 U.S. at 538-39 (quoting *Penn Central*, 438 U.S. at 124). The "character of the governmental action" is also relevant. *Id.* at 539.

In the years since *Penn Central*, this Court has emphasized that the case supplies the "polestar" for assessing whether a regulatory taking has occurred. *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring), *quoted in Tahoe-Sierra Pres. Council v. Tahoe Reg'l*

*Planning Agency*, 535 U.S. 302, 326 n.23 (2002); *see also Lingle*, 544 U.S. at 539. The purpose of the *Penn Central* analysis is to determine whether the regulation so severely impairs the use or value of private property that it may properly be considered the functional equivalent of an exercise of eminent domain. *Lingle*, 544 U.S. at 539.

2. Contrary to Petitioners' contention (Pet. at 25), the en banc court did apply *Penn Central*. In doing so, it found that the City's 2002 ordinance did not, on its face, take Petitioners' property. Pet. App. at 17a-23a. The court began with *Penn Central's* primary factors: the 2002 ordinance's insubstantial economic impact on Petitioners and their lack of "distinct investment-backed expectations." *Id.* at 18a; *see Lingle*, 544 U.S. at 538-39.

Petitioners' facial claim challenged Respondent's enactment of the 2002 ordinance, not the County's 1979 or 1987 enactments. Pet. at 3; Pet. App. at 17a-18a; Pet. App. at 36a-38a & n.10 (Bea, J., dissenting). Indeed, a facial challenge to the County ordinance would clearly be time-barred, because such a challenge attacks "mere enactment" of the regulation, and both prior ordinances had been enacted at least ten years before Petitioners purchased the property. Pet. App. at 17a; *see Va. Surface Min. & Reclamation Ass'n*, 452 U.S. at 295 (holding that on a facial claim the court asks "whether the 'mere enactment' of the [challenged regulation] constitutes a taking"); *see also Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997) (holding that a facial claim accrues "the moment the challenged regulation or ordinance is passed").

Like the en banc dissent, Petitioners elide the crucial distinction between the County's and Respondent's ordinances. Pet. at 26-27; Pet. App. at 29a-33a (Bea, J., dissenting). Petitioners have advanced two theories of the rent control program's economic impact on them, but both are based on the effect of the County ordinance, not the ordinance that Petitioners have challenged.

First, Petitioners argue that "the Ordinance" transferred wealth from mobilehome park owners to mobilehome owners because mobilehome owners can sell their regulated mobilehomes for more than they could without regulation. Pet. at 26; Pet. App. at 31a-32a (Bea, J., dissenting). But Respondent's reenactment of the existing County ordinance did not cause such a transfer. Assuming it occurred, "[t]hat transfer occurred in 1979 and 1987, from other landlords, and probably benefitting other tenants." Pet. at 22a. There is no evidence that the *2002 ordinance*, the "mere enactment" of which is challenged here, transferred any wealth from Petitioners to anyone else. At worst, the ordinance failed to transfer that wealth anew to Petitioners.

Second, Petitioners claim more broadly that no one "dispute[d] that "the Ordinance seriously impacted the value of [petitioners'] property." Pet. at 25 (quoting Pet. App. at 30a (Bea, J., dissenting) (alterations in original)). The choice of language — "the Ordinance" — is deliberately vague. *The County's* "mere enactment" of the 1979 ordinance may have affected the value of what is now Petitioners' property. Indeed, Petitioners paid a lower price for their property as a result. Resp. App. at 7-8; *see also* Pet. App. at 14a, 18a, 19a, 21a-22a. But *Respondent's*

2002 ordinance had no comparable effect. Respondent could not take what Petitioners claim was previously taken by the County. Petitioners have submitted no evidence that the 2002 ordinance caused any change whatsoever in the value of their property. *See* Pet. App. at 18a. That is the appropriate measure of economic impact. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492-93 (1987) (finding that "petitioners have also failed to make a showing of diminution of value sufficient" to show a taking); *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962) (holding that "comparison of values before and after [enactment of a regulation] is relevant" to "determine where regulation ends and taking begins").

In fact, the evidence that Petitioners did submit did not address the market value of their real property. They quote the dissent's erroneous statement that Petitioners "presented evidence that the Ordinance deprives them of 80% of the market value of their mobile home park land." Pet. at 25 (quoting Pet. App. at 30a (Bea, J., dissenting)). On the contrary, the evidence showed only that the mobilehome space *rents* controlled by the ordinance were below prevailing market *rents* for comparable spaces. Resp. App. at 6-7.

In sum, the economic impact of rent control on Petitioners' property, however measured, was a fait accompli before they made any investment in the property in 1997. The "mere enactment" of Respondent's ordinances in 2002 did nothing to affect the value of Petitioners' property.

The en banc court also correctly concluded that Petitioners had no reasonable investment-backed expectation of unregulated use of the property. Pet. App. at 19a. In 1997, when Petitioners purchased the property, the program had been in effect for nearly 20 years, and Respondent would not incorporate and adopt the 2002 ordinance for five more years. They made no investment in reliance on being able to operate the park unencumbered by rent control.

Petitioners, like the dissent, argue they had an expectation of potentially freeing the property of its restrictions. Pet. at 26; Pet. App. at 39a-41a (Bea, J., dissenting). But this Court has never suggested that a plaintiff's dream of challenging a regulation as a taking is sufficient to form reasonable investment-backed expectations to support a claim that the regulation is a taking. To be sure, "[s]ome circularity must be tolerated in these matters." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring). But Petitioners' argument is not merely circular; it is a swirling logical vortex that would swallow the expectations factor whole. Any claimant could allege the "expectations" so important to a takings claim simply by asserting his hope of prevailing on a takings claim — the impact of the regulation on the claimant's investment would be irrelevant.[3] The Court could not have intended that

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[3] The Petition and the en banc dissent are devoid of discussion of the impact of the challenged regulation on Petitioners' investment.

this "particularly" important factor would be so insubstantial. *Penn Central*, 438 U.S. at 124.

Finally, the en banc court concluded that the "character of the government action" undermined Petitioners' claim, because the 2002 ordinance only continued a long-existing regulation. Pet. App. at 18a, 21a. The "character" of the rent control program's effect on property is markedly different from those that this Court has previously found so probative of a taking. *See, e.g., Hodel v. Irving*, 481 U.S. 704, 716 (1987) (prohibition of devise); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (physical occupation); *Penn Central*, 438 U.S. at 124 (same); *see also Yee v. City of Escondido*, 503 U.S. 519, 527-29 (1992) (mobilehome rent control regulation did not cause a physical taking). Rather, this case is closer to *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986). In applying the character factor in that case, the Court found that the challenged regulation "adjust[ed] the benefits and burdens of economic life to promote the common good" by protecting participants in multi-employer retirement plans from the financial impacts of withdrawing employers on those participants. *Id.* at 225.

The rent control program here similarly "adjusts the benefits and burdens" in a commercial relationship, protecting mobilehome park tenants from the market power wielded by park owners in the absence of regulation:

> the purpose of the ordinance . . . is not just to lower rents, but to "alleviate the hardship" to mobile home owners caused by "the high cost of moving mobilehomes, the po-

## QUESTION PRESENTED

In 1997, Petitioners purchased a mobilehome park subject to Santa Barbara County's 1987 mobilehome rent control ordinance. In 2002, the newly incorporated City of Goleta, in which Petitioners' park is located, adopted the County's ordinance without alteration.

Did the Ninth Circuit, en banc, err in concluding under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), that the City's 2002 adoption, on its face, did not take Petitioners' property because it had no impact on the value of Petitioners' property or their investment-backed expectations?

> tential for damage resulting therefrom, requirements relating to the installation of mobilehomes, including permits, landscaping and site preparation, the lack of alternative homesites for mobilehome residents and the substantial investment of mobilehome owners in such homes." . . . *It protects owners of mobilehomes from the leverage owners of the pads have, to collect a premium reflecting the cost of moving the mobile home on top of the market value of use of the land.*

Pet. App. at 23a-24a (emphasis added) (quoting Goleta Municipal Code § 08.14.010); *see* Pet. App. at 159a (Santa Barbara County Code § 11A-1); *cf. Pennell v. City of San Jose*, 485 U.S. 1, 13 (1988) ("Indeed, a primary purpose of rent control is the protection of tenants.").

Petitioners, like the dissent, contend that the character factor supports Petitioners, because the ordinance allegedly "fails to achieve its stated purpose." Pet. at 26 (citing Pet. App. at 43a-44a (Bea, J., dissenting)). This argument charges headlong into this Court's holding in *Lingle* that rejected that sort of means-ends analysis as inconsistent with the basic purpose of the Takings Clause: "whether a regulation of private property is *effective* in achieving some legitimate public purpose . . . is not a valid method of discerning whether private property has been 'taken.'" 544 U.S. at 542 (emphasis in original).

In sum, the en banc court dutifully performed the "ad hoc, factual inquir[y]" that this Court has identified as the paramount benchmark for deter-

mining whether regulation has caused a taking. *Tahoe-Sierra*, 535 U.S. at 326 & n.23.

## II. The Challenged Decision Is Consistent with *Palazzolo*.

The en banc court's *Penn Central* analysis belies Petitioners' contention that the court flouted the holding of *Palazzolo* by adopting a per se bar for claimants with notice of a challenged regulation. *See* Pet. at 14-16.

In *Palazzolo*, the Rhode Island Supreme Court had adopted just such a rule. It had held that a property owner who acquired property with notice of the challenged regulation could never challenge that regulation as an uncompensated taking. 533 U.S. at 616, 626. The Court rejected that "blanket rule," which it found to be "too blunt an instrument to accord with the duty to compensate for what is taken." *Id.* at 628. Language throughout the opinion demonstrates that the Court's concern was with the Rhode Island court's absolutism. *See id.* at 626 (rejecting the "sweeping[] rule" that "[a] purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking"); *id.* at 627 (rejecting "the State's rule" under which "the post-enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable"); *see also id.* at 632 (O'Connor, J., concurring) (describing the decision as rejecting "the sweeping rule that the preacquisition enactment of the use restriction *ipso facto* defeats any takings claim"); *id.* at 636 ("The

temptation to adopt what amount to *per se* rules in either direction must be resisted.").

The en banc court here adopted no "blanket rule." Rather, as just described, it concluded that none of the *Penn Central* factors supported finding a facial taking *on these facts*.

Moreover, the court acknowledged that Petitioners could still bring an as-applied challenge if they sought a rent adjustment and claimed that Respondent's decision on that application caused a taking. Pet. App. at 16a & n.37. The court held, "It is not as though an unconstitutional law becomes immunized from all challenges once limitations bar facial challenges to its enactment." *Id.* at 17a. Had the court intended to categorically prohibit post-enactment claims, it would have barred Petitioners from bringing an as-applied challenge as well.

The en banc court did emphasize that the preexistence of the rent control program meant that Petitioners lacked investment-backed expectations of unregulated use, but that was hardly improper. Although *Palazzolo* rejected a categorical defense based on notice of regulation, it did not prohibit courts from considering the timing of the claimant's acquisition in applying the *Penn Central* factors. The Court did not apply those factors at all, but rather remanded for that purpose. 533 U.S. at 632. On the other hand, all of the separate opinions in the case, except for Justice Scalia's concurrence, *id.* at 637 (Scalia, J., concurring), acknowledged that the timing of acquisition could be relevant in a *Penn Central* analysis. *See id.* at 635-36 (O'Connor, J., concurring); *id.* at 643 n.6 (Stevens, J., concurring in part and dissenting in

part); *id.* at 654 n.3 (Ginsberg, J., dissenting); *id.* at 655 (Breyer, J., dissenting).

> In particular, Justice O'Connor emphasized that
>
> > our decision today does not remove the regulatory backdrop against which an owner takes title to property from the purview of the *Penn Central* inquiry. . . . Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred.

*Id.* at 635-36 (O'Connor, J., concurring); *see also id.* at 633 ("[I]nterference with investment-backed expectations is one of a number of factors that a court must examine[, and] the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.").

In applying the expectations factor, the en banc court did not imply that post-enactment claimants are categorically barred from bringing a claim. Petitioners' claim failed not just because they had notice of the rent control restrictions when they bought the property, but also because they were not harmed by the subsequent reenactment they challenged — their investment was worth the same before Respondent's enactment as it was after. The facts, not per se rules, dictated the result.

## III. The Challenged Decision Is Consistent with the Lower Courts' Decisions Since *Palazzolo*.

Because the en banc decision does not categorically bar claimants with notice of a challenged regulation, there is no conflict between this decision and those of other federal and state courts after *Palazzolo*.

1. Petitioners cite several cases that allegedly conflict with the en banc decision. Pet. at 18-23. On the contrary, like the en banc decision, the cited cases recognize that the timing of acquisition is relevant to the *Penn Central* analysis.

The Federal Circuit's case law, which Petitioners emphasize (Pet. at 18-20), holds that "the regulatory environment at the time of the acquisition of the property remains both relevant and important in judging reasonable expectations." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1350 n.22 (Fed. Cir. 2001) (in banc) (citing *Palazzolo*, 533 U.S. at 632-34 (O'Connor, J., concurring)); *see also Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (notice of even *potential* regulation is relevant to reasonable investment-backed expectations); *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1351 (Fed. Cir. 2001). Similarly, the court in *Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359 (Fed. Cir. 2009), *cited in* Pet. at 18-19, remanded a takings claim for a full *Penn Central* analysis and instructed that "Schooner Harbor's knowledge of the regulation . . . is a factor that may be considered" in assessing its reasonable investment-backed expectations. *Id.* at 1366.

Petitioners' state court decisions also yield no conflict. They recognize that a plaintiff's pre-acquisition notice of a regulation does not absolutely bar a takings claim, *see State ex. rel. Shemo v. Mayfield Heights*, 765 N.E.2d 345, 352 (Ohio 2002); *Stansbury v. Jones*, 812 A.2d 312, 327 (Md. 2002); *Richard Roeser Prof'l Builder, Inc. v. Anne Arundel County*, 793 A.2d 545, 548 (Md. 2002), but *is* relevant in evaluating investment-backed expectations, *see State ex rel. Shelly Materials, Inc. v. Clark Cnty. Bd. of Comm'rs*, 875 N.E.2d 59, 67-68 (Ohio 2007); *Wensmann Realty, Inc. v. City of Egan*, 734 N.W.2d 623, 638 (Minn. 2007); *Cottonwood Farms v. Bd. of Cnty. Comm'rs*, 763 P.2d 551, 558 (Colo. 1988).

Finally, Petitioners' alleged "intra-state split of authority" in California does not exist. *See* Pet. at 22. The unpublished decision in *Mehling v. Town of San Anselmo,* No. A102563, 2004 WL 1179428 (Cal. App. 1st Dist. May 28, 2004),[4] only found that a post-enactment purchaser was not barred from asserting a categorical takings claim. *Id.* at *6. Petitioners do not assert a categorical claim (Pet. at 9), and the en banc court adopted no categorical bar. Furthermore, because the court emphasized that its decision would not preclude Petitioners from challenging application of the ordinances (Pet. App. at 16a-17a; *see also supra* Section II), the decision is also consistent with

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[4] Petitioners improperly rely on an unpublished decision of the California Court of Appeal. *See* Cal. R. Ct. 8.1115 ("[A]n opinion of a California Court of Appeal . . . that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.").

the California Supreme Court's holding that the statute of limitations did not preclude a plaintiff from challenging provisions of an ordinance when the ordinance was applied to the plaintiff. *See Travis v. Cnty. of Santa Cruz*, 94 P.3d 538, 545 (Cal. 2004).

2. Petitioners also omit other post-*Palazzolo* cases that echo the en banc court's finding that post-regulation investment is relevant to the reasonableness of a plaintiff's expectations.

In *Raceway Park, Inc. v. Ohio*, 356 F.3d 677 (6th Cir. 2004), the Sixth Circuit rejected a challenge to rules governing the distribution of gaming revenues because "the plaintiffs were well aware of the . . . Rule prior to making any investments related to simulcast-only racing, and could not, therefore have reasonably expected a greater return." *Id.* at 685. Likewise, the D.C. Circuit found that a rule limiting ownership of multiple local television stations did not interfere with broadcasters' reasonable expectations because the Federal Communications Commission had warned of the possible limitations in prior notices of proposed rulemaking. *Sinclair Broad. Group, Inc. v. F.C.C.*, 284 F.3d 148, 167 (D.C. Cir. 2002).

The Supreme Court of Connecticut reached a similar conclusion when a water supply company purchased a property long used as a well lot and then continued to use the property for that purpose for 20 years before challenging its zoning. *Rural Water Co., Inc. v. Zoning Bd. of App. of Town of Ridgefield*, 947 A.2d 944, 956 (Conn. 2008); *cf. Gove v. Zoning Bd. of App. of Chatham*, 831 N.E.2d 865, 874 (Mass. 2005) (property owner who admitted having no expectation of developing a restricted coastal par-

cel could not subsequently claim a taking when such development was disapproved). And the Supreme Court of Montana denied a *Penn Central* claim because the "publicly known and very controversial" risks associated with alternative game ranches and the "regulative and speculative nature of the industry . . . play[ed] a significant role in determining whether . . . investment-backed expectations [were] 'reasonable.'" *Buhmann v. Montana*, 201 P.3d 70, 92-39 (Mont. 2008).

State intermediate appellate courts, including courts in California, have also concluded that knowledge of regulation is a relevant consideration in a *Penn Central* analysis. *See Shaw v. County of Santa Cruz*, 88 Cal. Rptr. 3d 186, 224 (Cal. App. 1st Dist. 2008) ("whether the landowner had constructive knowledge of the regulation when choosing to improve the property" relevant to expectations); *see also K & K Const., Inc. v. Dep't of Envtl. Quality*, 705 N.W.2d 365, 382 (Mich. Ct. App. 2005); *Weatherford v. City of San Marcos*, 157 S.W.3d 473, 490 (Tex. App. 2004).

In sum, the en banc decision created no conflict with the takings decisions of other lower courts in the wake of *Palazzolo*. There is thus no split of authority for this Court to resolve.

## IV. Certiorari Is Inappropriate to Reconsider Whether "Fairness and Justice" Indicate a Taking.

At bottom, Petitioners are simply dissatisfied with how the en banc court applied the *Penn Central* factors to the facts. But certiorari is hardly appropriate to reapply this firmly established test. *See* Sup.

Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). Indeed, the Court has only sparingly reviewed applications of *Penn Central*.

The Court's apparent reluctance to review takings cases applying *Penn Central* is understandable because the test requires the ad hoc application of several factors to achieve the "fairness and justice" that are the goals of takings analysis. *Palazzolo*, 533 U.S. at 617-18 (quoting *Armstrong*, 364 U.S. at 49). Those considerations do not point to a taking on the facts of this case. Quite the contrary, finding a taking under these circumstances would be manifestly *unfair*, giving Petitioners a windfall at the expense of innocent mobilehome park tenants.

Given the Court's emphasis of fairness, it would be surprising to learn that the Takings Clause allows claimants to realize windfall profits. *See id.* at 635 (O'Connor, J., concurring) ("[I]f existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost."). *But cf. id.* at 636-37 (Scalia, J., concurring) (concluding that takings claims may result in a claimant's windfall). It is hardly a remedy for the government's having "forc[ed] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" to compensate people who have not borne those burdens. *Armstrong*, 364 U.S. at 49.

Petitioners would receive such a windfall if they were to prevail. They paid a price for their property

that reflected the existing regulation and suffered no loss when Respondent continued that regulation. By contrast, the owner of the property when the regulation was enacted by the County and its economic impact was felt on the property is not before the Court and stands to gain nothing from a judgment.

Nor would Petitioners' windfall come solely at the government's expense. *See Palazzolo*, 533 U.S. at 637 (Scalia, J., concurring) (government should not benefit from a taking from a prior landowner). If Respondent were ordered to compensate Petitioners, Respondent would be compelled to rescind its ordinance rather than pay the damages demanded by mobilehome park owners. As a result, wholly innocent parties — the numerous mobilehome owners who purchased their mobilehomes after the County adopted the program — would bear the brunt of Petitioners' claim. They have invested in their mobilehomes in reliance on rent control and therefore have paid more than they would have paid for uncontrolled mobilehome spaces. Pet. App. at 22a-23a; Resp. App. at 7. If the program were found to cause a taking, these owners would suffer a debilitating one-two punch: their capital investments would be devalued and their rents would be increased. In sum, as the en banc court aptly put it, these are "[t]he people who really do have investment-backed expectations that might be upset by changes in the rent control system." Pet. App. at 22a.

Finally, the burden of Petitioners' windfall would entirely miss the County, which originally enacted the program and therefore caused any alleged harm to Petitioners. Like the prior landowner, the County is not before the Court.

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE CASE ..... 1

BACKGROUND ..... 4

REASONS TO DENY THE PETITION ..... 7

I. The En Banc Court Faithfully Applied This Court's *Penn Central* Test to Find There Was No Taking on These Unusual Facts. ..... 7

II. The Challenged Decision Is Consistent with *Palazzolo*. ..... 14

III. The Challenged Decision Is Consistent with the Lower Courts' Decisions Since *Palazzolo* ..... 17

IV. Certiorari Is Inappropriate to Reconsider Whether "Fairness and Justice" Indicate a Taking. ..... 20

CONCLUSION ..... 23

In sum, this case involves neither the proper plaintiff nor the proper defendant. Finding a taking in this unusual situation would cause injustice, not remedy it.

## CONCLUSION

For the foregoing reasons, the Court should deny the petition for certiorari.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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| DANIEL GUGGENHEIM; SUSAN GUGGENHEIM; AND MAUREEN H. PIERCE,<br>Plaintiff,<br>vs.<br>CITY OF GOLETA,<br>Defendant. | Case No.<br>CV 02-2478 FMC (RZx)<br>**ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT** |

This matter is before the Court on Plaintiff's Motion for Partial Summary Judgment (docket #122). The Court has read and considered the moving, opposition, and reply documents submitted in connection with this Motion. The matter was heard on April 3, 2006, at which time the parties were in receipt of the Court's tentative Order. For the reasons set forth below, the Court denies Plaintiffs' Motion.

## I. Background

### A. Nature of the Action

This action arises out of a mobile home rent-control ordinance in the City of Goleta.

## B. Procedural History

This action has a lengthy procedural history, which may be briefly summarized as follows:

At the pleadings stage, the Court considered whether the present action was barred by the statute of limitations. Ultimately, the Court resolved that question in favor of the Plaintiffs. However, the Court declined to exercise jurisdiction over the related state-law claims, and because related state-law claims could possibly negate the need to determine constitutional questions presented by the current action, the Court stayed the action pending a state court's resolution of those claims. The parties eventually settled the state-law claims; as part of the settlement, the Defendant City of Goleta ("the City") is barred from challenging the Court's ruling on the statute of limitations issue. As a result of termination of the state-court proceedings, the Court lifted the stay in this action.

At the summary judgment stage, the Court held that the rent-control ordinance was an unconstitutional taking in violation of the Fifth and Fourteenth Amendments; therefore, the Court invalidated the challenged ordinance.[1] In reaching its holding, the Court was bound by Ninth Circuit precedent that held unconstitutional a similar mobile home rent-control

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[1] Because the Court held the ordinance invalid under the Takings Clause, the Court did not address Plaintiffs' due process and equal protection challenges.

ordinance. The Court (in this case) and the Ninth Circuit (in *Cashman*)[2] held that the ordinance was unconstitutional because it did not "substantially advance" its stated purpose – essentially, to provide lower cost housing to mobile home owners. To "substantially advance" the stated purpose of the law, the Ninth Circuit had held that the challenged law must actually be effective at remedying what the legislature intended upon remedying. *Id.*

The evidence before this Court was uncontroverted: the presence of the ordinance and market forces resulted in a premium on the sale of mobile homes. Therefore, in accordance with *Cashman,* the Court held that the premium on sale rendered the ordinance ineffective.

However, after the Court entered Judgment, and while this case was pending on appeal, the Supreme Court granted review of an unrelated Ninth Circuit case and invalidated the "substantially advances" test. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S.Ct. 2074, 2085 (2005). In light of *Lingle*, the parties agreed that the appeal should be dismissed and the Court's judgment and summary judgment order should be vacated.

On motion of the parties, the Court allowed a period of additional discovery and set deadlines for

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[2] *Cashman v. City of Cotati*, 374 F.3d 887, 890 (9th Cir. 2004)

the filing of dispositive motions. The present Motion was filed in accordance with the schedule set by the Court.

### C. Uncontroverted Facts

The Plaintiff purchased Rancho Mobile Estates Mobilehome Park ("the Park") in Santa Barbara County in an area that is now part of the City of Goleta, California, in 1997. At the time and since approximately 1987, the County of Santa Barbara had a mobile home rent-control ordinance ("the RCO") in place for unincorporated areas of the County. The Park was subject to the RCO while the Park was in the unincorporated area. In 2002, the City adopted the RCO as part of a generalized adoption and subsequent re-adoption of the Santa Barbara County Code when the City was created. *See* Cal. Gov't Code § 57376 (requiring newly incorporated cities to adopt an ordinance providing that all county ordinances shall remain in force for 120 days or until the city council has enacted ordinances superseding the county ordinances).

The express purpose of the RCO is set forth in the City Code:

> A growing shortage of housing units resulting in a critically low vacancy rate and rapidly rising and exorbitant rents exploiting this shortage constitutes serious housing problems affecting a substantial portion of those Santa Barbara County residents who

> reside in rental housing. These conditions endanger the public health and welfare of the County of Santa Barbara. Especially acute is the problem of low vacancy rates and rapidly rising and exorbitant rents in mobilehome parks in the County of Santa Barbara. Because of such factors and the high costs of moving mobilehomes, the potential for damage resulting therefrom, requirements relating to the installation of mobilehomes, including permits, landscaping and site preparation, the lack of alternative homesites for mobilehome residents and the substantial investment of mobilehome owners in such homes, the board of supervisors finds and declares it necessary to protect the owners and occupiers of mobilehomes from unreasonable rents while at the same time recognizing the need for mobilehome park owners to receive a fair return on their investment and rent increases sufficient to cover their increased costs. The purpose of this chapter is to alleviate the hardship caused by this problem by imposing rent controls in mobilehome parks within the unincorporated area of the county of Santa Barbara.

Goleta City Code, § 11A-1.

Within the City of Goleta, only owners of mobile home parks are subject to rent-control ordinances, owners of other types of properties are not subject to rent-control ordinances.

The RCO limits any increase in rents to the Park on an annual basis to 75% of the increase in the Consumer Price Index ("CPI") or 5%, whichever is less. This allowable annual increase is referred to as the "automatic increase." *See* Goleta City Code, § 11A-5(g). The RCO contains a "vacancy control" provision, which prevents the Park from raising rents to the market rate when a mobile home is sold and a new resident moves into the Park. However, the RCO allows a total rent increase of up to 10% on vacancy over any four-year period.

The RCO has a complex a "discretionary rent increase" provision. The park owner must give the mobile home owner a notice of the increase in rent if the increase exceeds 75% of the CPI. Goleta City Code § 11A-5(a)(2). The park owner must itemize amounts for increased operating costs, capital expenses incurred in the prior year, capital expenses incurred in the prior year that have not been fully reimbursed, and capital improvements. *Id.* at 11A-5(a)(3)(A). Homeowners may file a petition for a hearing to protest the proposed increase. *Id.* at 11A-5(b). An arbitrator may allow a discretionary rent for "increased costs where increases in expenses and expenditures justify such increase." *Id.* at 11A-5(h). In doing so, the arbitrator must consider evidence of "all relevant factors", which "may include, but is not limited to" such factors such as increases in operating expenses, insurance, repairs, taxes, capital expenses, capital improvements, and increases in amenities. *Id.* at 11A-5(f)(1). Increases in the amounts of principal

and interest paid on loans and depreciation may not be not considered by the arbitrator. *Id.*

Housing costs in the City increased approximately 205% from 1997 to 2003, and increased another 21.1% in 2004. The rent on the rent-controlled spaces in the Park have not kept up with the increase in housing costs.

Based on a sample of mobile home space rentals in the Park that were examined by Plaintiff's expert, the rent actually charged by Plaintiffs represent a 76.75% to 78.5% discount over the market rate. The RCO has resulted in what is known as "transfer premiums" in the sale of mobile homes.[3] These transfer premiums constitute approximately 90% of the sale price of mobile homes in the Park. No provision in the RCO prevents the seller of a mobile home from capturing transfer premiums.

At the time it adopted the RCO, the City make no findings regarding the need for a RCO in the City.

The City's expert offers the following uncontroverted opinions: 1) The RCO was in effect when Plaintiffs purchased the Park; therefore, the purchase price of the Park would have had factored in the lower anticipated income that would be derived from

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[3] The City purports to dispute this fact, citing its own expert report. However, the City has failed to provide a pinpoint citation to the thirty-page report; therefore, the Court treats this fact as undisputed.

the property. *See* Thomsen Report, Ex. B to Opposition. In other words, the anticipated reduction in income from the property that would be a result of the RCO was reflected in the purchase price of the Park, and the purchase price would have been higher had the property not been subject to any such restrictions. 2) The rate of return on investment in the property is comparable to that of other real estate investments. *Id.* 3) The value of Plaintiffs' property has appreciated significantly over the past several years, and Plaintiffs have refinanced the property on two occasions, increasing the loan amount on the property from $1.9 million to $3 million and then from $2.8 million to $3.7 million, resulting in $1.8 million in cash distributions to equity holders. *Id.*

### D. The Present Motion

Plaintiffs' Motion seeks summary judgment as to their claims based on the Takings Clause, the Due Process Clause, and the Equal Protection Clause. As to the takings claim, Plaintiffs argue that the RCO has effected a taking of private property for public use without just compensation in two ways: First, Plaintiffs argue there has been a taking because the RCO has the effect of requiring Plaintiffs to provide a rent subsidy equal to approximately 80% of the fair market value of the rent. Second, Plaintiffs argue that the RCO has the effect of transferring the value of the Park to the mobile home owners by virtue of the creation of a premium, equal to approximately

90% of the sale price, on the sale of the mobile homes that are located in the Park.

As to the due process claim, Plaintiffs argue that the RCO violates due process in two ways. First, Plaintiffs argue that the RCO is unconstitutional under the "traditional" substantive due process analysis in that the RCO is not rationally related to any legitimate state purpose. Second, Plaintiffs argue that the RCO does not permit them to earn a just and reasonable return.

As to the equal protection claim, in their final argument, Plaintiffs contend that the RCO unfairly singles out Plaintiffs to bear the burden of providing low-cost housing.

Plaintiffs make only facial challenges to the RCO. *See* Motion at 1 ("The City's mobilehome rent control ordinance is facially unconstitutional for four separate reasons.") A facial challenge claims "that the mere enactment of a statute constitutes a taking," but an as-applied challenge claims "that the particular impact of a government action on a specific piece of property requires the payment of just compensation." *Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura*, 371 F.3d 1046, 1051 (9th Cir. 2004) (internal quotation marks and citation omitted).

## TABLE OF AUTHORITIES

Page

Cases

*Agins v. City of Tiburon*,
447 U.S. 255 (1980).....5

*Appolo Fuels, Inc. v. United States*,
381 F.3d 1338 (Fed. Cir. 2004).....17

*Armstrong v. United States*,
364 U.S. 40 (1960).....3, 21

*Buhmann v. Montana*,
201 P.3d 70 (Mont. 2008).....20

*Commonwealth Edison Co. v. United States*,
271 F.3d 1327 (Fed. Cir. 2001).....17

*Connolly v. Pension Benefit Guaranty Corp.*,
475 U.S. 211 (1986).....12

*Cottonwood Farms v. Bd. of Cnty. Comm'rs*,
763 P.2d 551 (Colo. 1988).....18

*Goldblatt v. Hempstead*,
369 U.S. 590 (1962).....10

*Gove v. Zoning Bd. of App. of Chatham*,
831 N.E.2d 865 (Mass. 2005).....19

*Hodel v. Irving*,
481 U.S. 704 (1987).....12

## II. Summary Judgment Standard

Summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. Rule Civ. Pro. 56(c); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505 (1986). Whether a fact is material is determined by looking to the governing substantive law; if the fact may affect the outcome, it is material. *Id.* at 248, 106 S.Ct. 2505.

If the moving party meets its initial burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Mere disagreement or the bald assertion that a genuine issue of material fact exists does not preclude the use of summary judgment. *Harper v. Wallingford*, 877 F.2d 728 (9th Cir. 1989).

The Court construes all evidence and reasonable inferences drawn therefrom in favor of the non-moving party. *Anderson*, 477 U.S. at 255; *Brookside Assocs. v. Rifkin*, 49 F.3d 490, 492-93 (9th Cir. 1995).

## III. Takings Claim

### A. *Lingle*

The *Lingle* case, which led the parties to dismiss the appeal of the Court's prior summary judgment Order, provides the framework whereby the Court must analyze Plaintiffs' takings claim. In *Lingle*, the Supreme Court invalidated the "substantially advances" test, but reaffirmed other tests used by courts to determine whether a taking has occurred. The Supreme Court first noted that *per se* takings occur where a property owner suffers a permanent physical invasion of her property and where a regulation "completely deprive[s] an owner of '*all* economically beneficial us[e] of her property.'" *Lingle*, 125 S. Ct. 2081 (citing *Loretto v. Teleprompter Manhattan CATC Corp.*, 458 U.S. 419, 102 S. Ct. 3164 (1982) and quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S. Ct. 2886 (1992)).

The Supreme Court also noted that a taking could occur in a "land-use" exaction situation, i.e., where the government conditioned the granting of a development permit on the dedication of an easement to the public by the property owner. *Lingle*, 125 S. Ct. at 2086 (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994)). A taking occurs in such a situation where the dedication of private property is not "roughly proportional . . . to the impact of the proposed development."

*Lingle*, 125 S. Ct. at 2086 (citations and alteration marks omitted).

Where the governmental action complained of is neither in the category of *per se* takings nor the category of land-use exactions, it is subject to the *Penn Central* balancing test, which the Supreme Court reaffirmed in *Lingle*. *See Lingle*, 125 S.Ct. at 2081-82, citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978). Under the *Penn Central* test, "several factors . . . have particular significance," including "[t]he economic impact of the regulation," the "character of the governmental action", and "the extent to which the regulation has interfered with distinct investment-backed expectations." *Lingle*, 125 S. Ct. at 2081-82.

In developing the framework by which to analyze regulatory takings claims, the Supreme Court has attempted to "identify regulatory actions that are functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the owner from his domain." *Id.* at 2082. Therefore, where a regulation completely eliminates a property's value, a taking has occurred. *Id.* Similarly, the *Penn Central* test focuses on "the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Id.*

### B. *Penn Central* Test

Therefore, with this in mind, the Court considers whether Plaintiffs are entitled to summary judgment

under the *Penn Central* test, and pays particular attention to the three factors enunciated therein.

### 1. Economic Impact

The first factor is "[t]he economic impact of the regulation." On this factor, the evidence is uncontroverted, but mixed. On the one hand, Plaintiffs have offered evidence that the rent actually charged by Plaintiffs represent a 76.75% to 78.5% discount over the market rate. This means that a space that would, in the absence of the RCO, rent for $1,000, rents for an average of only $215 to $232 with the RCO. Plaintiffs have also offered evidence that the RCO has resulted in transfer premiums that average approximately 90% of the sale price of mobile homes in the Park. Plaintiffs argue that this results in a transfer of the value in the property from them to the mobile home owners, as reflected in the inflated prices at which they sell their mobile homes.

On the other hand, the City has offered evidence that the rate of return on investment[4] on the property is comparable to that of other real estate investments. Moreover, the City has offered evidence that the value of Plaintiffs' property has appreciated significantly over the past several years.

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[4] This rate of return is discussed as a ratio of operating income to investment amount.

Considering all this evidence, a reasonable inference that may be drawn is that although Plaintiffs have received a rate of return on investment comparable to other real estate investments, and although they have enjoyed a significant appreciation in value of their property, Plaintiffs could have received higher rates of return in the absence of the RCO.

### 2. Character of the Governmental Action

The second factor the Court must consider is "the character of the governmental action." In *Penn Central*, the Supreme Court elaborated on this factor, stating that

> [a] "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

*Penn Central,* 438 U.S. at 124. Here, the stated purpose of the RCO is to protect mobile home owners from exorbitant rent for the spaces upon which their homes are situated. The RCO recognizes the unique position occupied by the mobile home owners (who own the homes but rent the land underneath those homes) due to the cost of moving the mobile homes and placing them on a new space, as well as the

potential damage that can be incurred in moving them. The inference to be drawn from this stated purpose is that mobile home owners, having placed an expensive-to-move home on land rented from the property owner, is in a uniquely vulnerable bargaining position when a lease on land is up for renegotiation. The character of this action is therefore less like a physical invasion and more like an "adjust[ment to] the benefits and burdens of economic life to promote the common good."

Plaintiffs argue that the current effect of the RCO is to impose rent levels that are unreasonably low and that the resulting premium on sale has transferred the value of the land from the Park owners to the mobile home owners through the creation of the premium on sale of the mobile homes. In support of their argument that this caused an unconstitutional taking, Plaintiffs rely on *Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996), which held that local entities may not adopt regulations that are designed to favor a particular private property, even though the regulations are justified by a pretextual public purpose. In *Armendariz*, the plaintiffs contended that the city enforced the housing code in an unconstitutional manner in order to deflate the value of the plaintiffs' property and to allow for commercial redevelopment of the land. *Armendariz*, 75 F.3d at 1326. Specifically, Plaintiffs here argue that "the overwhelming impact and only conceivable purpose advanced by the City in adopting the Ordinance was to facilitate the transfer of the underlying

real property from the park owner to tenant, resulting in a private taking." In this case, unlike the *Armendariz* case, there is absolutely no evidence that the stated reason for the RCO is pretextual and that the actual reason for maintaining the RCO is to allow for a transfer of the value of property from the Park owners to the mobile home owners. Accordingly, there is no evidence that supports Plaintiffs' contention that the character of the governmental action is suspect; rather, the evidence points to an adoption of a county ordinance along with an adoption of the county ordinance's express purpose as part of a blanket adoption by a new city of the county's ordinance as required by Cal Gov't Code § 57376.

Plaintiffs also argue that the RCO unfairly singles them out to contribute to providing low-cost housing in a way that other landowners are not required to contribute. Plaintiffs rely on the test for determining whether a taking has occurred in a land-use exaction situation and argue that their contribution is not "proportional" as required by *Nollan* and *Dolan*. However, in *Lingle*, the Supreme Court made no suggestion that elements of the various tests regarding takings (*per se* tests, *Penn Central* test, and the *Nollan/Dolan* land-use exaction tests) could be combined in the way suggested by Plaintiffs. Moreover, Plaintiffs' argument ignores the express purpose of the RCO, which is to protect mobile home owners from exploitation due to their unique vulnerability.

On balance, the Court finds nothing sinister in the purpose of the RCO. There is no evidence of the

actual impermissible motive advanced by Plaintiffs. The City is not bound, as it might be in a *Nollan/Dolan* land-use exaction situation to ensure that the benefits to Plaintiffs are roughly proportional to the impact of the development.

### 3. Interference with Investment-Backed Expectations

This leads the Court to what is, in this particular case, the most significant factor of all – "the extent to which the regulation has interfered with distinct investment-backed expectations." *Lingle*, 125 S. Ct. at 2081-82. Here, it is uncontroverted that Plaintiffs purchased the Park while the RCO was in effect.[5] The

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[5] Plaintiffs argue that the Court should not consider this fact and that it should instead consider "the market value of the property unburdened by the regulation being challenged." Reply at 17. Plaintiffs rely on *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448 (2001), which held that the acquisition of title by a landowner after the effective date of the challenged law does not preclude a takings challenge. However, the majority's opinion in *Palazzolo* does not go so far as to hold that the possible effect of the challenged law on the value of the property should not be factored into the analysis regarding "the distinct investment-backed expectations." *Compare Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring) ("[T]he regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.") *with Palazzolo*, 533 U.S. at 637 (Scalia, J., concurring) ("In my view, the fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking.") Accordingly, the Court considers how the fact that

(Continued on following page)

Park owners bought the Park subject to the RCO, and the Park has at all times been subject to the RCO.[6] Therefore, the investors' expectations of the value of the Park when purchased, as well as the income to be received from the Park, should have been, at all times, tempered by the knowledge that the RCO would have an adverse effect on their investment. Therefore, there has been no interference with investment-backed expectations.

### 4. Ruling Re *Penn Central* Test

In considering the *Penn Central* factors, the Court is faced with the task of measuring "the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle,* 125 S. Ct. at 2082. Here, the evidence of the rate of return on investment is mixed. Although Plaintiffs have enjoyed a rate of return comparable to

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Plaintiffs knew of the RCO when they purchased the Park should shape their expectations regarding their investment. *See Carpenter v. United States*, 69 Fed. Cl. 718, 732 (Fed. Cl. 2006) ("The Federal Circuit has held that *Palazzolo* did not reject the principle that the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of [a plaintiff's] expectations.") (citations and internal quotation marks omitted).

[6] The fact that the RCO was, at the time, a county ordinance is not lost on the Court. Nor is the fact that the RCO was subsequently adopted by the City. The fact remains that the RCO has – for all practical purposes – remained in effect, unchanged in substance, for all times relevant to the present action.

other real estate investments, Plaintiffs' evidence tends to suggest that they would have earned more – perhaps much more – in the absence of the RCO. However, the character of the governmental action is less like a *per se* taking and more like a permissible shifting of economic benefits and burdens. Moreover, its express purpose is to protect a group of consumers whom the legislature believed to be especially vulnerable to exploitation. Most importantly, as explained above, there has been no interference with investment-backed expectations. It appears to the Court that Plaintiffs got exactly what they bargained for when they purchased the Park – a mobile-home park subject to a detailed rent-control ordinance.

Plaintiff's Motion for Summary Judgment as to their takings claim is denied.

## IV. Equal Protection Claim and "Traditional" Substantive Due Process Claim

Where a substantive due process claim or equal protection claim is not based on a suspect classification and where a fundamental right is not implicated, government action is unconstitutional only when it is irrational, arbitrary, or malicious. *Nelson v. City of Irvine*, 143 F.3d 1196, 1205 (9th Cir. 1998) (equal protection); *P.B. v. Koch*, 96 F.3d 1298, 1302 -03 (9th Cir. 1996) (substantive due process).

Here, the RCO has an express purpose that is rationally related to the RCO. The RCO imposes limitations on rent increases in mobile home parks

*Hodel v. Va. Surface Min. & Reclamation Ass'n*,
452 U.S. 264 (1981).....2, 8

*K & K Const., Inc. v. Dep't of Envtl. Quality*,
705 N.W.2d 365 (Mich. Ct. App. 2005) .....20

*Keystone Bituminous Coal Ass'n v. DeBenedictis*,
480 U.S. 470 (1987).....10

*Lingle v. Chevron U.S.A. Inc.*,
544 U.S. 528 (2005).....6, 7, 8, 13

*Loretto v. Teleprompter Manhattan CATV Corp.*,
458 U.S. 419 (1982).....12

*Lucas v. S.C. Coastal Council*,
505 U.S. 1003 (1992).....11

*Mehling v. Town of San Anselmo*,
No. A102563, 2004 WL 1179428
(Cal. App. 1st Dist. May 28, 2004).....18

*Pa. Coal Co. v. Mahon*,
260 U.S. 393 (1922).....7

*Palazzolo v. Rhode Island*,
533 U.S. 606 (2001).....passim

*Pennell v. City of San Jose*,
485 U.S. 1 (1988).....13

*Raceway Park, Inc. v. Ohio*,
356 F.3d 677 (6th Cir. 2004) .....19

with the purpose of protecting mobile home owners from "unreasonable rents." Although the Court held, in connection with the previous summary judgment Order, that the RCO did not "substantially advance" its stated purpose, there are two reasons why that holding is of limited relevance today. First, the Supreme Court has invalidated the "substantially advances" test as a measure of unconstitutionality. The Supreme Court noted that the "substantially advances" test has no applicability to takings jurisprudence, and was "regrettably imprecise" when applied to due process jurisprudence in that it suggested a means-ends test – i.e., it implied that in order to pass rational basis review, a challenged law must actually achieve some legitimate public purpose. *Lingle*, 125 S. Ct. at 2083-84. Such is not the law. Rather, the Supreme Court noted that where a challenged law is not rationally related to a legitimate public purpose, it may also not be actually effective in achieving such a purpose. *See id.* Plaintiff argues that the RCO is not actually effective in achieving its purpose, as reflected in the premium on sale that it has created.

However, this implicates the second reason why the Court's holding regarding the RCO's failure to "substantially advance" its stated purpose is of limited relevance. In connection with the present Motion, the City has presented additional evidence, in the form of an expert report, that tends to establish that the RCO is at least partially effective. Many of the residents who live in the mobile homes in the Park

have not sold their mobile homes, did not pay a premium, and continue to enjoy the benefits of low-cost housing as a result of the RCO.

Therefore, the uncontroverted evidence does not establish that the RCO is arbitrary, irrational, or malicious, and summary judgment in favor of Plaintiffs as to these claims is therefore denied.

## V. Due Process – Just and Reasonable Return

Plaintiffs contend that they have a substantive due process right to a fair rate of return on their investment in the Park. This doctrine was discussed in a Supreme Court case regarding price-control; specifically, this substantive due process right finds its roots in a Supreme Court case discussing the Natural Gas Act of 1938, which allowed the Federal Power Commission to regulate the price of natural gas. *See Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603, 64 S.Ct. 281 (1944) ("[T]he fixing of 'just and reasonable' rates, involves a balancing of the investor and consumer interests. . . . [T]he investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include the service of the debt and dividends on the stock."). Broadly read, this case requires that where a legislative body imposes price controls, it must create some

mechanism to provide for a fair rate of return on investment.

The Ninth Circuit has applied this concept to rent-control ordinances. For instance, Plaintiffs rely on *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 958 (9th Cir. 1991), *vacated on other grounds as stated in* 938 F.2d 951 (9th Cir. 1992),[7] which held that a plaintiff may have a substantive due process claim where a rent-control ordinance failed to provide for a "fair and reasonable" return on an investment because it denied rent increases to allow for a return on additional capital improvements:

> [E]very dollar the landlord puts into the property by way of capital improvements constitutes an investment in the property for which a "fair and reasonable" return must be allowed. Breaking even is not enough; the

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[7] At the hearing on this matter, counsel for the City argued that the Court should disregard *Sierra Lake* because the United States Supreme Court vacated the court's judgment. Although the Supreme Court vacated the judgment and remanded the action, the Ninth Circuit reinstated the relevant portions of *Sierra Lake*. *See City of Rocklin v. Sierra Lakes Reserve*, 506 U.S. 802, 113 S. Ct. 31 (1992) ("The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of Yee v. City of Escondido. . . ."); *Sierra Lake Reserve v. City of Rocklin*, 987 F.2d 662 (9th Cir. 1993) ("We therefore vacate Part I of the *Sierra Lake Reserve* opinion, which dealt with the physical taking claim. We retain Part II because the due process and equal protection claims it considered are unaffected by *Yee*.").

> law must provide for a profit on one's investment. . . . Thus, Ordinance 529 must do more than simply allow plaintiff to pass through certain costs; it must ensure that plaintiff will receive a reasonable return on those expenditures. To the extent plaintiff alleges that the rent increases allowed on account of capital improvements merely offset the cost of those improvements (or less), it has stated a claim for a violation of substantive due process. . . .

*Id.* (citation omitted). In reaching this holding, the Ninth Circuit relied on *Guaranty National Insurance Co. v. Gates*, 916 F.2d 508, 512-14 & n. 4 (9th Cir. 1990), which noted that a law is unconstitutional where it provides only for a break-even point and does not allow for a fair rate of return.

The Court must consider Plaintiffs' challenge in its context: Plaintiffs have made a facial challenge to the RCO. A facial challenge to a law's constitutionality is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [law] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). "The fact that [a challenged law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid. . . ." *Id.*

Here, a provision in the RCO allows for an increase, in an amount up to one-half of the automatic

increase, "as a just and reasonable return on investment." Goleta City Code, § 11A-5(i)(1). This amount may – or may not – be sufficient to constitute a "fair and reasonable" return on investment. As a result, it is possible that the RCO could be administered in a constitutional manner. Accordingly, the RCO is not facially unconstitutional for failure to provide for a fair rate of return on Plaintiffs' investment, and the Court denies Plaintiffs' Motion for Summary Judgment as to this issue.

## VI. Conclusion

As set forth above, the Court denies Plaintiff's Motion for Partial Summary Judgment (docket #122).

Dated: April 4, 2006

/s/ Florence-Marie Cooper
FLORENCE-MARIE COOPER, Judge
UNITED STATES DISTRICT COURT

*Richard Roeser Prof'l Builder, Inc. v. Anne Arundel County*,
793 A.2d 545 (Md. 2002).....18

*Rith Energy, Inc. v. United States*,
270 F.3d 1347 (Fed. Cir. 2001).....17

*Rural Water Co., Inc. v. Zoning Bd. of App. of Town of Ridgefield*,
947 A.2d 944 (Conn. 2008) .....19

*Schooner Harbor Ventures, Inc. v. United States*,
569 F.3d 1359 (Fed. Cir. 2009).....17

*Shaw v. County of Santa Cruz*,
88 Cal. Rptr. 3d 186 (Cal. App. 1st Dist. 2008) ....20

*Sinclair Broad. Group, Inc. v. F.C.C.*,
284 F.3d 148 (D.C. Cir. 2002).....19

*Stansbury v. Jones*,
812 A.2d 312 (Md. 2002).....18

*State ex rel. Shelly Materials, Inc. v. Clark Cnty. Bd. of Comm'rs*,
875 N.E.2d 59 (Ohio 2007) .....18

*State ex. rel. Shemo v. Mayfield Heights*,
765 N.E.2d 345 (Ohio 2002) .....18

*Suitum v. Tahoe Reg'l Planning Agency*,
520 U.S. 725 (1997).....8

*Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*,
535 U.S. 302 (2002).....8, 14

*Travis v. Cnty. of Santa Cruz*,
94 P.3d 538 (Cal. 2004).....19

*Weatherford v. City of San Marcos*,
157 S.W.3d 473 (Tex. App. 2004).....20

*Wensmann Realty, Inc. v. City of Egan*,
734 N.W.2d 623 (Minn. 2007).....18

*Yee v. City of Escondido*,
503 U.S. 519 (1992).....12

**Statutes and Rules**

California Government Code § 57376 .....5

California Rule of Court 8.1115.....18

Ninth Circuit Rule 35-3 .....6

U.S. Supreme Court Rule 10 .....20-21

## STATEMENT OF THE CASE

In 1997, Petitioners purchased a mobilehome park subject to a rent control ordinance adopted by Santa Barbara County in 1979 and amended in 1987. Upon incorporating in 2002, Respondent City of Goleta adopted the ordinance without change. Petitioners argue that this 2002 enactment, on its face, took their property without compensation.

Petitioners contend that, in rejecting their claim, the Ninth Circuit, en banc, flouted this Court's decision in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). Their petition is founded on the false premise that the en banc court adopted a categorical rule barring takings claims by property owners who acquired their property after it became subject to regulation.

Eight judges of the Court of Appeals did not blithely ignore this Court's holding in *Palazzolo* and adopt such a categorical rule. Rather, the en banc court found no taking after faithfully applying the three-factor test of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), to the unusual facts of this case.

First, the court recognized that Respondent's enactment of the ordinance in 2002, on its face, had no effect on the value of Petitioners' property because the County's rent control ordinance had applied to the property for the preceding two decades in identical form. Any economic impact of the rent control program was caused when the County adopted and amended it long before. The rent limits applicable to Petitioners' property remained precisely the same after Respondent's 2002 enactment as before. The economic impact of the "mere enactment" of Respon-

dent's ordinance on Petitioners was therefore nil. *See Hodel v. Va. Surface Min. & Reclamation Ass'n*, 452 U.S. 264, 295 (1981).

Second, Petitioners had no investment-backed expectation of using the property in a manner inconsistent with the longstanding rent control regulation. They purchased the property in 1997, ten years after the County amended the challenged rent limits, and they paid a price that reflected those limits. When they purchased the property, Petitioners could not have expected that they could avoid the regulation. Accordingly, in continuing the existing regulation, Respondent did not impair any legitimate expectation about the return Petitioners could earn on that investment.

Third, the en banc court correctly concluded that *Penn Central*'s "character of the government action" factor supports rejecting the takings claim. The 2002 enactment caused no physical invasion of Petitioners' property and indeed did not change the status quo at all. It only perpetuated a regulation that two decades before had "adjusted the benefits and burdens" of the commercial relationship between mobilehome park owners and tenants. *Penn Central*, 438 U.S. at 124.

Because the en banc decision did no more than apply the firmly-established *Penn Central* factors, it is consistent with both *Palazzolo* and the post-*Palazzolo* decisions of the lower courts, which have held uniformly that the circumstances of the claimant's acquisition of property remain relevant in a *Penn Central* analysis.